Supreme Court, U.S.
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No. 09-826

In The
# Supreme Court of the United States

DAVID K. STONE AND NICHOLAS B. LOUNDAGIN,

*Petitioners,*

v.

DEVON ENERGY PRODUCTION COMPANY, L.P. AND CARPENTER & SONS, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Wyoming Supreme Court**

## PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

I. Since the Issue of Damages Arose for the First Time as Part of the Wyoming Supreme Court Decision, there was No Notice or Opportunity to Address this Issue ..... 1

II. *Stone I* Was Not A Final Appealable Decision ..... 3

III. Stone and Loundagin Were Denied Their Procederial Due Process Rights ..... 3

# TABLE OF AUTHORITIES

Page

CASES

*Brown v. Grady*, 92 P. 622 (Wyo. 1907) ..... 6

*Dumas v. Ropp*, 558 P.2d 632 (Idaho 1997) ..... 6

*Ekberg v. Sharp*, 76 P.3d 1250 (Wyo. 2003) ..... 6

*Hathorn v. Lovorn*, 457 U.S. 255 (1982) ..... 3

*Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1997) ..... 3

*Loffland Bros. Co. v. Rougeau*, 655 F.2d 103 (10th Cir. 1981) ..... 3

*O'Dell v. Espinova*, 456 U.S. 430 (1982) ..... 3

*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ..... 2

*Rainbow Oil Co. v. Christman*, 656 P.2d 538 (Wyo. 1982) ..... 5

*Sagebrush Dev. v. Moehrke*, 604 P.2d 198 (1979) ..... 4, 5

*Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995) ..... 3

*Tennaco Oil Co. v. Gaffney*, 369 F.2d 306 (10th Cir. 1966) ..... 4, 5

STATUTES

28 U.S.C. §1257 ..... 3

OTHER AUTHORITIES

22 *Am. Jur.* 2d Damages §78 at 113 (2003) ..... 4

## I. Since the Issue of Damages Arose for the First Time as Part of the Wyoming Supreme Court Decision, there was No Notice or Opportunity to Address this Issue.

In practical effect, the brief of Respondents, Devon Energy Production Company, L.P. and Carpenter & Sons, Inc. ("Devon and Carpenter") confirms the reasons asserted by Petitioners, David K. Stone and Nicholas B. Loundagin ("Stone and Loundagin") for granting a writ of certiorari, since Devon and Carpenter agree that the nature of the proceedings in the state district court did not address or raise the issue that the Wyoming Supreme Court relied upon to decide the appeal in *Stone I*, (Pet. App. 21). Specifically the procedural background of the case shows that the matter before the Wyoming Supreme Court in *Stone I* was only directed to Stone and Loundagin's Motion for Partial Summary Judgment (Pet. App. 103), which motion addressed only whether Devon was required under the Supplemental Agreement to have reassigned the State Lease operating rights six months prior to the expiration of the lease term. Because of the bifurcated nature of this summary judgment motion, the fact intensive and complex issues of determining the contractual damages was to be reserved until Devon's liability under the Reassignment Clause was determined. Nowhere does the brief of Devon and Carpenter cite to any place in the appendix (or the record on appeal) where the damages Stone and Loundagin suffered by reason of Devon's contractual breach were even raised. Nevertheless Devon and

Carpenter would apparently have Stone and Loundagin anticipate that there would be a Fifth Amendment issue when they filed and argued their motion for partial summary judgment. Thus the primary point of Petitioners' lengthy appendix is to show that Stone and Loundagin never had notice or opportunity in the lower court to "present" upon the very issue that the Wyoming Supreme Court decided the case upon. The very absence of the issue of damages in the parties' pleadings and briefs leading up to *Stone I* proves that Stone and Loundagin were "blindsided" by the Wyoming Supreme Court's *Stone I* decision. How can Petitioners cite to something in the record when they were taken by surprise by an appellate court stepping into a fact finding role?

After *Stone I* was issued, Stone and Loundagin timely filed their Petition for Rehearing to the Wyoming Supreme Court wherein Stone and Loundagin asserted the Fifth Amendment issue that is the subject of their pending Petition to this Court. (Pet. App. 76-77). The claim at issue was presented, through their Petition for Rehearing to the Wyoming Supreme Court, with "fair precision and in due time". *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980).

What is most notable about Devon and Carpenter's brief is its failure to cite any case from this Court which addresses the issue of "surprise" in the context of the "notice and opportunity" requirement under the Fifth Amendment such that Stone and Loundagin would not be able to prove any damages.

## II. *Stone I* Was Not A Final Appealable Decision.

Devon and Carpenter contend that Stone and Loundagin's Petition for Writ of Certiorari was untimely since the Constitutional issue arose as a result of the *Stone I* decision. (Resp. Brief at 16). This Court, like other appellate courts, cannot review a state court judgment until it is final. *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 76 (1997); *O'Dell v. Espinova*, 456 U.S. 430 (1982). Devon and Carpenter contend that Stone and Loundagin's Petition for Writ of Certiorari was untimely since the Constitutional issue arose as a result of the *Stone I* decision. (Resp. Brief at 16). The decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982) presents a similar procedural situation as the instant case in which the Mississippi Supreme Court, like the Wyoming Supreme Court in *Stone I,* remanded the case for further proceedings. Because of the remand, the first decision of the Mississippi Supreme Court was not reviewable by this Court. *Id.* at 262. See also *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995); *Loffland Bros. Co. v. Rougeau*, 655 F.2d 103 (10th Cir. 1981). In summary, *Stone I* was not a final and appealable order under 28 U.S.C. §1257.

## III. Stone and Loundagin Were Denied Their Procedural Due Process Rights.

Devon and Carpenter contend there was no denial of Stone and Loundagin's due process rights since " . . . under well-established case law, the

measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease at the time the lease terminates." (Resp. Brief at 20). Not only is this an erroneous statement of the law, but it misses the entire point of the Petition for Writ of Certiorari. Stone and Loundagin never had the opportunity to address this damage issue. Further *Stone I* appears to affect a fundamental change in the determination of breach of contract damages rather than to reiterate "well-established case law". More precisely the decision could be interpreted as reversing, *sub silentio*, the Wyoming Supreme Court's decision in *Sagebrush Dev. v. Moehrke*, 604 P.2d 198, 204 (1979), which held that "[d]amages are measured as of the date of the breach". The *Moehrke* standard appears to be an almost universally accepted standard reflecting long accepted common law precedent for determining the date as of which breach of contract damages are determined. See 22 *Am. Jur.* 2d Damages §78 at 113 (2003):

> Damages for a breach of contract are to be determined as of the time of the occurrence of the breach, with interest to the date of judgment and not from a prior date. Under this rule, later events such as fluctuations in value after the breach do not affect the measure of damages.

Devon and Carpenter's brief incorrectly cites *Tennaco Oil Co. v. Gaffney*, 369 F.2d 306, 309 (10th Cir. 1966) for the proposition that the measure of damages for breach of a reassignment provision in a

oil and gas lease is the value of the lease at the time the lease terminates. Quite to the contrary, *Gaffney* actually holds, consistent with *Moehrke*, that "[t]he proper measure of damages was the value of the property at the time the deed ought to have been delivered . . . " *Gaffney*, 369 F.2d at 309. If Stone and Loundagin had been allowed the opportunity to argue their damages, they would have pointed out that the purpose of the Reassignment Clause was not merely to protect the timely payment of overriding royalties (of which there were none at the time of the breach or on the date set for lease termination), but it was primarily to also allow Stone and Loundagin the opportunity to develop a valuable oil and gas prospect.

If, *arguendo*, there were no damages suffered by Stone and Loundagin as a result of Devon's breach, then the Wyoming Supreme Court should have at least allowed a trial on the specific performance claim asserted by Stone and Loundagin. The remedy of specific performance is appropriate when " . . . damages for breach are an inadequate and impractical remedy under the circumstances of the case." *Rainbow Oil Co. v. Christman*, 656 P.2d 538, 545 (Wyo. 1982).

> The object in such cases [specific performance] is to place the party without fault in as nearly the same position as he would have been had there been no default by the other party. The guiding principle in such cases is

> *to relate the contract back to the date set therein.*

*Ekberg v. Sharp*, 76 P.3d 1250, 1257 (Wyo. 2003) (citations omitted) (emphasis added).

By adapting the contractual damages rationale of *Stone I* to decide *Stone II*, the Wyoming Supreme Court has impermissibly blurred the distinction between contract and property law concepts. Damages arising from a breach of contract are separate and distinct from the claims for relief under property law concepts, such as reflected in the ejectment and trespass claims of Stone and Loundagin (See, e.g., mesne profits as an ejectment remedy. *Dumas v. Ropp*, 558 P.2d 632 (Idaho 1997); *Brown v. Grady*, 92 P. 622 (Wyo. 1907).) By applying the contractual damage analysis under *Stone I* to Stone and Loundagin's property law claims under *Stone II*, the Wyoming Supreme Court has perpetuated and compounded the original error of refusing to allow Stone and Loundagin the opportunity to present argument on the contractual damages resulting from Devon's breach of the Reassignment Clause.

Respectfully submitted,

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